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NH COMMISSION
FOR HUMAN RIGHTS

STATE OF NEW HAMPSHIRE
COMMISSION FOR HUMAN RIGHTS

Case number: ES (P) 0120-01

Robin Henry (now Pond) v. Dino's Family Restaurant and
Athina Evangeliou, Owner

DECISION

Introduction:

This charge of employment discrimination based on pregnancy was filed at the Commission on May 8, 2001. A finding of Probable Cause was issued by the investigating commissioner on April 18, 2003, and an Order of Notice was served on the parties. A public hearing was held on November 12, 2003, before Commissioners Hilson (Chair), Robertson-Allen, and Simoes.

This case was consolidated for hearing with *Karen Hayes v. Dino's Family Restaurant et al.*, #ES (P) 0121-01, pursuant to Commission Rule Hum 209.15. Separate decisions are being issued.

All parties were represented by counsel. The following persons testified under oath: Robin Henry (Pond), the complainant; Karen Hayes; Jeremy Pond, complainant's husband; Gary O'Brien, Hayes' former boyfriend; Lynnette Plaisted, former employee of respondent; Konstantino Evangeliou, Respondent's son; Athina Evangeliou; Kathryn Merrill, former employee; Colleen Guidi, former employee, and sister of Kathryn Merrill; Frederick Merrill, accountant (no relation to Kathryn Merrill).

In making its findings the Commission has considered (1) the testimony of the witnesses, (2) the *Verified Response of Athina Evangeliou d/b/a Dino's Family Restaurant*, with signed supporting statements from herself, her son, Kostas N. Evangeliou, Lynnette M. Plaisted and Kathy Merrill, filed 6/11/01, which is part of the record pursuant to NH Code of Administrative Rules, Part Hum 209.04 and Hum 209.17, and (3) the exhibits submitted by the parties, with the exception of Respondent's Exhibit #8.

Findings:

Dino's Family Restaurant was located in Rochester, New Hampshire and employed at least six persons at all relevant times. It was started in 1988 by the respondent Athina Evangeliou, her husband, and another couple. It closed in August 2001. By 2000, Athina Evangeliou managed the restaurant, was the sole owner, and held all the officer positions in the corporation. (Respondent's Exhibit #2)

Dino's Family Restaurant Tax Return for 2001 (Respondent's Exhibit #1) shows that the corporation's total assets and its total liabilities and shareholders' equity were equal at both the beginning and at the end of the tax year. The return reports assets and liabilities at the beginning of the year equal to \$40,268. each; the return reports assets and liabilities at the end of the year equal to \$7286. each. Schedule K-1 shows that Athina Evangeliou, as sole shareholder, received the total amount of ordinary income (\$3512) from the business, as well as a property distribution of \$21,961. resulting from the sale of the restaurant building on August 21, 2001. The total gain reported on the sale was \$30,120. (Respondent's Exhibit #1)

The restaurant was open seven days per week, serving breakfast, lunch, and dinner, except on Sundays, when the restaurant was open from 7 AM until 2 PM. Athina Evangeliou worked in the restaurant

fulltime and was there every day from approximately 6:00 AM until 8:30 PM, after closing. The restaurant seated approximately 140 people.

Initially, Mrs. Evangeliou did prep work and cooking, and her husband did bills and ordering. However, after her husband's death Mrs. Evangeliou took over all the duties of running the restaurant, assisted at various times by her daughter Maria and her son Konstantino (Kostas). Maria returned to Greece in 1999 or early 2000. Kostas was a fulltime student during the time in question, November 2000 through April 2001, but he testified that he returned home on weekends and sometimes assisted his mother in running the restaurant.

On Monday through Friday the restaurant always had 2 waitresses until noon, and two more from noon until closing. On Saturdays, respondent testified that there were 2-3 waitresses, and on Sundays there were 3 waitresses. The restaurant had no written policy regarding pregnancy or maternity leave.

Robin Henry, aged 31, started working at Dino's in December 1998. She testified that at first everything went well, that the owner's daughter was there and was great to work with. She sometimes provided transportation to respondent, getting up at 4:30 AM to pick her up, and also did shopping for her for no extra compensation. Complainant testified that she thought Evangeliou "was her friend." She had no problems at work and was never disciplined by respondent.

Complainant testified that her regular hours were Monday, Tuesday, Thursday and Friday, from 11:30 AM until 7 or 7:30 PM, and Sundays, when she worked from 8 AM until either noon or 2 PM. (See also: Plaintiff's Exhibit #1, paragraph (8)) Complainant testified that she averaged "thirty plus" hours per week. Pay records kept by respondent show that during 2000, for the 48 weeks for which there is a legible entry for complainant, she averaged 28.17 hours per week. (Plaintiff's Exhibit 8) Records show that complainant's rate of pay was \$2.13 per hour plus a roughly equal amount in tips, or \$4.23 per hour. (Plaintiff's exhibit #3).

Complainant testified that in early December 2000, Evangeliou had her call another employee, Karen Hayes, and tell her that her services were no longer needed because she was pregnant and could not work. Complainant testified that upon learning that Hayes was pregnant, Evangeliou said that Hayes wouldn't be able to work and "wouldn't last two months." Complainant called Hayes and told her she was off the schedule.

The complainant testified that in early January 2001 she informed respondent that she was pregnant. She testified that within a month her hours were cut to Tuesdays, Thursdays, and Sundays, and that as a result her income was reduced. In addition, she alleges that Kathy Merrill, another waitress, was treating her badly, at least in part because of her pregnancy. She testified that Merrill was talking about her in front of customers, including family and friends of complainant. Merrill was also giving her fewer hours.

Complainant alleges that Evangeliou too made negative comments relating to her pregnancy, including telling her she was getting fat, not to wear pants, and telling complainant, who mentioned that she wanted to breast-feed, that she couldn't do so because she needed to be back at work in two weeks [after the baby was born]. Complainant alleges that when she tried to talk with Evangeliou about the problem with her hours and with Merrill, Evangeliou would say "You pregnant - can't work, I need Kathy," or words to that effect. Complainant testified that she contacted Kostas Evangeliou about the problems at work, but he never called her back. Kostas testified that he was contacted by complainant regarding her problems with Merrill and because she was not pleased with her hours, but that he "left it in Merrill's hands." He said he had taken over scheduling decisions for a couple of weeks and that was probably why Robin had called him.

Documentary evidence (Plaintiff's Exhibit 8) shows that for the 12 weeks she worked in 2001, complainant averaged 18.76 hours per week, instead of the 28 she had been working in 2000. In the four weeks before her employment ended, complainant worked 11, 11, 18, and 18 hours, respectively. Records of other waitresses' hours do not show a similar reduction. (Plaintiff's exhibit #3)

No hours are shown for complainant for 3 weeks between January 1 and April 20, 2001: the weeks ending February 2, February 9, and March 23. When asked whether complainant had taken two weeks off, Evangeliou stated that she could not recall exactly, but thought that complainant had [taken two weeks off]. Neither party offered any evidence regarding the third week for which there are no hours shown for complainant.

On April 18, 2001, complainant came into work with her boyfriend Jeremy Pond, now her husband. She testified that she talked to Mrs. Evangeliou, asking her to make the problems with Merrill stop. The Investigative Report (Plaintiff's Exhibit 4), which complainant testified was accurate, provides information from two individuals who had overheard Merrill talking in a negative fashion about complainant. Complainant's mother, Marion Henry, and Theresa Rawson, both confirmed to the Commission investigator that while they were customers in Dino's, they overheard Merrill and her sister (Colleen Guidi) making negative comments about complainant's pregnancy, including that complainant was getting fat, that she was unwed, that complainant would not take care of her baby, and that they pitied the baby. Complainant testified that when she spoke to Evangeliou about this problem, the respondent only said "You pregnant - can't work - I need Kathy." Mrs. Evangeliou also reportedly said that after the baby came things would change. (Neither Henry nor Rawson testified at the hearing.)

Faced with a situation which would not change, complainant says she had no choice but to leave, but that she wasn't quitting her job, she felt like she was being terminated. Complainant's husband, Pond, testified that he went to the restaurant with Robin when she talked to "Tina" [Evangeliou]. He says complainant told Tina she was being harassed and that Tina said there was nothing she could do, stating "You're pregnant - can't work - Kathy will fill in." Pond states that complainant was embarrassed and crying, and that their financial situation was "very tight."

After leaving Dino's, complainant attempted to find work elsewhere but obtained little more than a few hours babysitting. She testified that she liked her job, had been there a long time, and that it was very upsetting [to leave] as she was unmarried and had no income. She was embarrassed because she had no money, and felt inadequate as a mother. She went to counseling to deal with trust issues, because she had thought "they were my friends."

Respondent denied that there was any discrimination against the complainant, in the form of harassing comments by either Merrill or Mrs. Evangeliou, the reduction of her hours because of pregnancy, or her termination. Mrs. Evangeliou denies making the statements regarding breast-feeding, wearing pants, or getting fat. Mrs. Evangeliou acknowledged that complainant had come to her to complain about her hours: but she also said that Robin talked to her and "said that after January she needed less hours and that's how the schedule was." When asked whether she had cut Henry's hours after learning she was pregnant, Mrs. Evangeliou said, "No, not cutting hours - schedule just going that way - changing."

When asked by her attorney on direct examination what the circumstances of Henry's leaving her employment had been, Mrs. Evangeliou stated that she did not know the reason why she left, but she stated further that Henry had left "herself of her free will."

Kostas Evangeliou testified that Henry and Merrill never got along and were always fighting. He acknowledged that Henry called him at school because she was not pleased with her hours and because of problems with Kathy Merrill the head waitress.

Lynnette Plaisted, a former employee, testified at the hearing that she “never saw harassment.” She testified that she witnessed two arguments between Merrill and Henry and that she believed it was about scheduling. She said that Kathy Merrill was in charge of hours and that complainant used to change the hours, taking Plaisted’s hours or switching them to another day

In her verified statement, submitted by respondent as part of its *Verified Response* to the Charge (part of the Commission’s Record), Plaisted confirmed that Robin was fighting with Kathy Merrill. As in her testimony, she did not remember what they fought about but speculated that it was about scheduling. Plaisted also stated in her verified statement that Athina worried “*about Robin being pregnant. She didn’t want her to work too much. She wanted her to relax, take it easy, take care of her body.*” She confirmed that they had “*a brief conversation about when you’re pregnant, you eat healthy and you exercise to stay fit and stuff like that.*” She said that this was not a degrading conversation.

In her verified statement, Plaisted confirmed that Robin was “*fighting a lot with one of the other waitresses and getting really stressed out.*” Plaisted confirmed that she heard Robin tell Athina that Kathy [Merrill] was swearing at her in front of customers. Finally Plaisted said in her statement that she had heard from others that Robin left because she couldn’t handle the problems with Kathy and just walked out. (R-1, Transcript of Interview with Lynnette Plaisted, signed under oath 6/07/01)

At the hearing, Jeremy Pond testified that Plaisted called to speak with Robin after Robin was no longer working for respondent. Pond talked with her first, and he testified that Plaisted said she was being harassed too and for Robin to get a lawyer. Plaisted was pregnant at the time and had a baby in September 2001. At the hearing, she testified that she was never harassed by Kathy Merrill and that Tina did not have any problems with her (Plaisted’s) clothes, weight, or self-care. She denied ever speaking with Pond.

Kathy Merrill testified at the hearing that she was responsible for the work schedules, which she got approved by “Tina” [Evangeliou]. She said there were problems with the schedule when her handwriting was messy or she put down wrong hours. She hired people but never fired anyone unless approved by Tina. She confirmed that she knew the complainant was pregnant.

Merrill testified that she did not have a good relationship with complainant, and in fact would have terminated her – but would have had to do that without Tina’s approval. She stated that in April 2001 she had asked Tina to terminate complainant, but that Tina said “Right now we need her.”

Merrill suggested that there had been problems as a result of complainant’s switching hours on the schedule and not showing up for work, however when questioned further she indicated that it was usually complainant switching with another waitress, and that the restaurant’s policy was you could switch if you got your own replacement. The witness’ testimony regarding unexcused absences by the complainant was vague and not credible.

Legal Standard:

A. NH RSA 354-A: 7 prohibits discrimination in employment on the basis of sex. The word “sex” includes pregnancy and medical conditions which result from pregnancy. It is an illegal discriminatory practice for an employer to refuse to hire or to discharge an employee or to treat an employee differently in the terms and conditions of employment based on an employee’s pregnancy, unless such treatment is based upon a bona fide occupational qualification.

An employer must permit a female employee to take leave of absence for the period of temporary physical disability resulting from pregnancy, childbirth, or related medical conditions. When the employee is

physically able to return to work, her original job or a comparable position shall be made available to her unless business necessity makes this impossible or unreasonable. For all other employment related purposes, including receipt of benefits under fringe benefit programs, pregnancy, childbirth, and related medical conditions shall be considered temporary disabilities, and a female employee affected by pregnancy, childbirth, or related medical conditions shall be treated in the same manner as any employee affected by any other temporary disability.

B. In order to prove that a particular adverse employment action taken against her was discrimination because of her pregnancy, complainant must show that (1) she was pregnant at the relevant time, (2) her job performance was satisfactory, but (3) her employer took some adverse employment action against her while (4) treating non-pregnant employees differently. *Tara Gorski v. New Hampshire Department of Corrections*, First Circuit 2002; See also: *F.W. Morse & Co.*, 76 F.3d at 421.

Once the complainant has articulated this prima facie case, the respondent must articulate a legitimate non-discriminatory reason for its actions. The complainant must then be allowed to show that the respondent's stated reasons are a pretext for pregnancy discrimination. Using this legal framework, the burden of proof remains at all times on the charging party to establish her case by a preponderance of the evidence.

C. Harassment on the basis of pregnancy is also a violation of the law. "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). To show harassment on the basis of pregnancy, complainant would have to establish the following: (1) That she belongs to the protected class (sex/pregnancy); (2) that she was subjected to harassing conduct; (3) that the conduct was based on complainant's pregnancy; (4) that the conduct affected a term, condition, or privilege of employment in that it was sufficiently severe or pervasive to create a work environment that a reasonable person in the complaining party's position would find offensive, it had the purpose or effect of unreasonably interfering with the complainant's work performance, or it otherwise adversely affected the complainant's employment opportunities; and (5) there is some basis for employer liability.

The determination whether a complainant has established the existence of a hostile or abusive workplace depends on a consideration of all the circumstances, particularly those concerning: frequency of the discriminatory conduct, its severity, whether it was physically threatening or humiliating rather than a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance or opportunities.

With respect to conduct between fellow employees, an employer is liable for harassment when the employer knew or should have known of the harassing conduct and failed to take appropriate remedial action.

An employee who has not been terminated by her employer may try to establish "constructive discharge" by showing treatment so hostile or degrading that no reasonable employee would tolerate continuing in the position. An employee who establishes constructive discharge may recover damages based on the loss of employment, in addition to any other damages which may apply. *Melendez-Arroyo v. Cutler-Hammer*, First Circuit 2001.

Findings and Conclusions:

I. With respect to discrimination on the basis of her pregnancy, the complainant has established a *prima facie* case: (1) She was pregnant and informed her employer of this fact in late December or early January 2001; (2) Complainant was qualified for her job and was performing in a satisfactory manner; (3)

After her employer learned of complainant's pregnancy, her work hours were reduced an average of 10 hours per week during the period January – April 2001; (4) Non-pregnant employees did not have their hours reduced during this period. (Complainant was not replaced; her hours went to other waitresses.)

Respondent has provided conflicting statements and testimony regarding the reduction in complainant's hours of work after the first of January 2001, with respondent's initial *Response* to the charge denying the cuts, but written statements attached to the *Response* indicating that there were cuts because complainant would miss work, so they would give her time off to rest. (See: statements of Kathryn Merrill and Kostas Evangeliou, attached to respondent's *Response*.) At trial Merrill stated only that complainant "called out a few times," and someone would have to take her place. In her cross-examination, she alluded to "2 weeks of not showing" but no explanation or further evidence was provided. Mrs. Evangeliou testified that complainant may have taken two weeks off. Although Merrill testified to problems created when complainant and/or Hayes marked the schedule, she also clarified that it was mostly Hayes and complainant switching hours with one another, and that respondent did not have a problem with that.

In his statement attached to the *Response*, Kostas Evangeliou described how complainant began to miss work after she became pregnant, and how her hours were cut because of this. In his testimony, K. Evangeliou stated that complainant was not reliable and "We would cut her hours – let her rest – during the week after she called in sick. That was the bulk of the issue." In her testimony, Mrs. Evangeliou denied cutting complainant's hours because of her pregnancy; she said complainant's hours were going down because complainant came to her and said that after January she would need fewer hours. However, in her written statement attached to the Respondent's *Verified Response*, Mrs. Evangeliou stated that complainant's hours were cut because she would be sick or she would call in, on short notice. So just for the following week to be safe they "*wouldn't put her on for Saturday because we did not know how she would feel or show she would be the next day.*"

The Commission must make a finding based on the preponderance of the evidence presented, taking into consideration its apparent reliability and consistency. The Commissioners found the testimony of many of respondent's witnesses inconsistent. The Commission finds the respondent's non-discriminatory reasons for its actions to be not credible, and also finds that respondent has offered a discriminatory reason for its actions as well. The evidence supports a finding that respondent believed that complainant began missing work because of sickness after she became pregnant and as a result respondent began cutting her hours by its professed practice of giving her additional time off every time she missed work. Cutting a woman's work hours to let her "rest" after she misses work because of a temporary disability due to pregnancy is illegal. Thus, the Commission finds that the respondent violated the law with this expressed policy.

While noting that no credible evidence has been presented as to any actual unexcused absences of the complainant, pregnancy-related or otherwise, the Commission also finds that the following reason(s) offered for respondent's actions are unworthy of credence: complainant having unexcused absences, complainant saying she would need fewer hours after January; complainant's hours "just going down.."

Further, the Commission finds that respondent treated complainant differently because of her pregnancy with regard to resolving the issues with Merrill. When complainant asked that Merrill's actions towards her, which were based in part upon complainant's pregnancy, be stopped, and that her hours be restored, Evangeliou chose not to resolve the problem because complainant was pregnant and Evangeliou "needed Kathy." Evangeliou had expressed her concern that pregnant women were not able to continue their regular work schedules and "things would be different after the baby comes." Thus, based on all the foregoing reasons, the Commission finds that it was complainant's pregnancy which was the motivation for respondent's actions, and complainant would not have been treated in the same manner if she had not been pregnant.

II. With respect to harassment on the basis of pregnancy, the Commission finds in favor of the complainant. The Commission finds that there was an on-going personality conflict between complainant and Merrill, which escalated after complainant announced her pregnancy. The Commission was unable to credit Plaisted's testimony that she saw no harassment, given her sworn statement attached to the *Verified Response*. Merrill's treatment of complainant after she announced her pregnancy was based in part on her condition. It included swearing at her and possibly slanderous discussions of complainant's pending motherhood with customers and cutting complainant's hours of work by approximately one-third, a serious threat to a single parent.

The Commission credits complainant's testimony that the respondent discussed complainant's pregnant condition with her, including telling complainant that she should not breast-feed her child because she needed to be back to work in two weeks. Taken together with the cut in her hours, the actions of Merrill and Evangeliou would create a hostile work environment for a reasonable person in complainant's position, and did in fact interfere with complainant's work opportunities. Because Evangeliou was the owner and manager of the restaurant, took some of the actions herself, and knew of Merrill's actions but took no action to correct the situation, the respondent is liable for any damage resulting from a hostile work environment.

III. The Commission finds that complainant was constructively discharged in April 2001. Her hours were being cut and she was the subject of continuing hostility toward her based on her pregnancy from Kathy Merrill. Her complaints to the owner's son were ignored; when she complained to the owner she was told that because she was pregnant, the owner viewed her as unable to work. The owner made it clear that she needed the non-pregnant employee, Merrill; therefore, nothing could or would be done. A reasonable person in complainant's position would conclude that these conditions were going to continue and that her employer no longer wanted her working there. There is no good reason why complainant should have continued to tolerate the situation.

Damages:

Having found for the complainant the Commission awards her lost wages in the amount of \$507.60 for the period January 1, 2001 to April 18, 2001 (10 hours per week x \$4.23 x 12 weeks, since complainant did not work 3 weeks during that period), and \$1776.60 for the period April 18, 2001 until August 1, 2001, when the restaurant closed (15 weeks @ 28 hours per week x \$4.23). The Commission awards the complainant her reasonable attorney's fees and costs in bringing her claim. Her attorney shall file a Motion for Attorney's fees, with an itemized statement showing his charges, within 20 days of his receipt of this order. The Commission also awards the complainant \$3,000. as compensatory damages for the stress and humiliation she experienced as a result of respondent's actions, which also caused her to rely on public assistance, to seek counseling, and diminished her sense of self-worth as a mother.

Rulings on Specific Requests of the Parties:

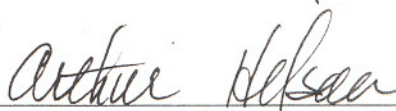
A. Complainant's Requests for Findings and Rulings:

1. Complainant's requests numbered 1 – 19 are granted.
2. Complainant's request number 20 is denied.
3. Complainant's requests numbered 21 and 22 are granted.
4. Complainant's request number 23 is granted, with the word "regularly" deleted.
5. Complainant's request number 24 is granted.
6. Complainant's request number 25 is granted as follows: "Robin was constructively discharged from her employment on April 18, 2001, when in response to complainant's request that respondent do something about Merrill's harassment and complainant's reduced hours, Evangeliou stated, "You pregnant, I need Kathy."

7. Complainant's request number 26 is granted.
 8. Complainant's request number 27 is granted, but the loss is \$42.30 per week.
 9. Complainant's request number 28 is granted, but the loss is \$118.44 per week.
 10. Complainant's requests numbered 26-32 are granted.
- B. Complainant's Requests for Rulings of Law:
1. Complainant's requests A – D are granted.
 2. Complainant's request E is denied. (See specific findings in text of Decision above).
- C. Respondent's Requests for Findings of Fact:
1. Requests numbered 1-3 are denied.
 2. Request number 4 is granted as follows: Robin Pond was forced to quit her employment with Dino's Family Restaurant, in part because her hours were being reduced and in part because she was being harassed.
 3. Request number 5 is granted.
 4. Requests number 6-17 are denied.
 5. Requests numbered 18-22 are granted.
 6. Requests numbered 23 and 24 are denied.
 7. Request numbered 25 is granted.
 8. Request number 26 is denied.
 9. Request number 27 is granted.
 10. Request number 28 is denied.
- D. Respondent's Requests for Rulings of Law:
1. Requests numbered 29 – 40 are denied.
 2. Request number 41 is granted.
 3. Requests numbered 42-44 are denied.
 4. Request number 45 is granted.
 5. Request number 46 is denied because "clear and convincing proof" is not the burden of proof which is required in hearings before the Commission.
 6. Request number 47 is denied.
 7. Request number 48 is granted.
 8. Requests numbered 49 and 50 are denied.

So Ordered.

Dated: 6/7/04



Arthur Hilson, Chair

On behalf of himself, and
Nancy Robertson-Allen, Comm.
Laura Simoes, Comm.
Who concur in the Decision.

Copies to:

Edgar D. McKean, III
Robert A. Shaines

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